

Judicial assistance to the Rwandan and Yugoslav war crimes tribunals

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X. LAW OF WAR

A. Judicial Assistance to the Rwandan and Yugoslav War Crimes Tribunals: Guidelines and Implementing Legislation

by André Klip^{*1}

In order to help states to implement the obligations deriving from Security Council Resolutions on the ICTY, the Judges and the Registrar of the ICTY drew up guidelines. These guidelines as well as six national (draft) acts on assistance to the ICTY are discussed below.¹¹

Tribunal Guidelines. *Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827 of 25 May 1993*, February 15, 1995.²¹ According to a footnote these guidelines indicate areas of national law that may need to be revised by States in order to implement the Statute. Article 2 reiterates the duty to co-operate fully with Tribunal requests. Article 4 deals with the obligation to defer to the competence of the ICTY any criminal proceeding pending before any national authority. Article 5 states that the national chief prosecutor shall use his best endeavors to ensure prompt arrest of any person against whom an arrest warrant has been issued. The immediate surrender of the accused to the ICTY is dealt with in Article 6. Article 7 reminds states to provide for a legal basis for provisional arrest. Article 8 contains a general obligation to provide "other forms of assistance".

Article 9 stipulates that certain obligations for witnesses and experts should exist. The national legislation should provide for an obligation for persons in that state who are summoned by a Judge or a Trial Chamber to appear as witnesses or experts, shall comply with that summons. Article 9 paragraph 4 seems to give a safe conduct: "Witnesses and experts who attended a trial before the International Tribunal may return to the State without losing any particular status they might have enjoyed before they left the State to testify."

Article 10 contains the obligation to supply relevant data from police files. Article 11 stipulates that free transit of persons appearing before the Tribunal should be guaranteed. Articles 12 and 13 advise to apply national procedures analogically when seizure and return of property and proceeds of crime are concerned. Article 14 shows new light on the ideas of the judges on the enforcement of sentences. In cases in which a convicted person is eligible for pardon or commutation a national decision may not be taken until the President of the International Tribunal has ruled on the matter.

Cooperation between non-governmental organizations and the International Criminal Tribunal for the Former Yugoslavia. The Prosecutor's Office issued a letter concerning the cooperation between NGO's and the Tribunal on September 25, 1995. It explains in which ways NGOs could assist the Tribunal in the performance of its mandate. It would be helpful if NGOs could forward to the Prosecutor's Office particulars of any known investigations or prosecutions taking place in national courts.

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¹¹ See legislation of other countries, André Klip, *International Criminal Tribunal Yugoslavia, Legislation Enacted by Ten Different Nations on Judicial Assistance to the International Criminal Tribunal*, 11 INT'L ENFORCEMENT L. REP. 329-332 (Aug. 1995).

²¹ Mentioned in the second annual report of the International Criminal Tribunal for the Former Yugoslavia, dated 14 August 1995, to the Security Council and the General Assembly, pursuant to article 34 of the Statute of the Tribunal, see paragraph 134.



There is also a serious warning when it comes to interviewing witnesses and victims, which could jeopardize, hinder, or interfere with investigations being carried out by the Prosecutor's Office. Such interviewing could contaminate witnesses or evidence and thus may prejudice the chances of mounting a successful prosecution.

However, NGOs could assist the Tribunal in providing particulars about victims, witnesses, offenders, the villages where the crime occurred, as well as the present whereabouts of those persons and whether the persons are prepared to be interviewed by the Prosecutor's representatives.

All NGOs which may be able to assist the Tribunal are invited to contact the Prosecutor's Office in the Hague.

Australia. *An Act to provide for the Commonwealth to help the International War Crimes Tribunals perform their functions, and for related purposes, referred to as the International War Crimes Tribunals Act 1995.*

Entered into force on 28 August 1995. To the knowledge of the author this is the most voluminous piece of legislation implementing the Security Council's resolutions. The remit of this act is not limited to the ICTY. It is also applicable to the Rwanda International Criminal Tribunal. The act provides a legal basis for all forms of assistance to war crimes tribunals.

Section 19 introduces a ground for refusal and stipulates that the Attorney-General must not issue a surrender warrant if there are no sufficient guarantees that a person imprisoned under Australian law will be returned to Australia to serve the remainder of the sentence. Section 24 deals with the effect of surrender to a Tribunal on person's terms of imprisonment.

Section 26 paragraph 3 (*see also* sections 33 (2), 35 (2), 36 (4), 40 (2), 44 (3)) states that the Attorney General must not comply with a request when this would prejudice Australia's sovereignty, security or national interest or if there are special circumstances justifying non-compliance. These grounds for refusal raise the question whether they are in conformity with the obligation to comply fully with requests of the ICTY.³⁵ Interesting is that the act not only provides for obligations for Australian authorities. Section 37, paragraph 1 reads: "A Tribunal is to give, to the extent (if any) required by the Attorney-General, an undertaking, in relation to any prisoner who is to give evidence in a foreign country pursuant to a request by the Tribunal, that the prisoner will be returned to Australia in accordance with arrangements agreed to by the Attorney-General."

Part 5 (sections 41-43) of the International War Crimes Tribunals Act 1995 deals with sittings of a Tribunal in Australia. While a Tribunal is sitting in Australia, it may exercise such powers as prescribed by its Statute and Rules of Procedure and Evidence. Contravention of Tribunal orders can be punished by imprisonment for two years (section 43).

New Zealand. *An Act to provide for New Zealand to assist (a) The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; (b) The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994; and (c) Other ad hoc tribunals that may be established by the Security Council of the United Nations under chapter VII of the Charter of the United Nations for the prosecution of violations of international humanitarian law - in the performance of their functions, of*

³⁵ See Article 29 of the Statute of the ICTY and its Rules of Procedure and Evidence.



June 9, 1995. This International War Crimes Tribunal Act is the only act of all the present acts implementing Security Council Resolution 827 (1993) to provide assistance for any future *ad hoc* Tribunals to be established by the Security Council. All forms of assistance are available under New Zealand law. Section 15 is an impediment to the surrender of a person serving a full-time custodial sentence in New Zealand for surrender to the Tribunal when the Attorney-General is not satisfied with the undertakings of the Tribunal relating to the return of the person. Section 26 deals with the compellability of persons to attend before a judge in New Zealand and to give evidence. No compulsion may be used if the person could not be compelled to give evidence in proceedings before the Tribunal (Section 26(3)). The testimonial privileges of New Zealand law apply as well. Like the Australian law assistance can be given for evidence to be taken in New Zealand, before the Tribunal and in a foreign country.

Section 36 states that a Tribunal may sit in New Zealand for the purpose of performing its functions. The Tribunal may execute its powers under the Statute and Rules of Procedure and Evidence (section 37), it may administer oaths (section 38). Contempt of Tribunal, while sitting in New Zealand, is punishable (section 40).

Denmark, *Act on Criminal Proceedings before the International Tribunal for the Prosecution of Persons Responsible for War Crimes Committed in the Territory of Former*

Yugoslavia, Act No.1099 of December 21, 1994. Entered into force on January 1, 1995. The Danish act contains seven articles only and deals with the deferral of a criminal case to the Tribunal and with the transfer of the accused to the Hague.

This act also applies to assistance to the Rwanda Tribunal by virtue of a decree of October 20, 1995. *Bekendtgørelse om strafforfølgning ved det internationale tribunal til pådømmelse af folkedrab og andre alvorlige overtrædelser af international humanitær ret begået i Rwanda m.v.* Published in Justitsministeriets bekendtgørelse nr. 832 af 30. oktober 1995. Entered into force on December 1, 1995.

Ireland, *An Act to make provision for the recovery of the proceeds of drug trafficking and other offences, to create an offence of money laundering, to make provision for international co-operation in respect of certain criminal law enforcement procedures and for forfeiture of property used in the commission of crime and to provide for related matters of June 30, 1994.* Section 56 of the Criminal Justice Act, 1994, No.15 mandates the Irish government to include provisions in Irish law on cooperation for international war crimes tribunals. It does not contain provisions on judicial assistance to the Tribunal itself. Section 56 (1) reads: "The Government may by regulations make such modifications of this Act as appear to it be necessary or expedient for the purpose of adapting any of the provisions of this Part of this Act to enable the State to provide co-operation under those provisions for an international tribunal or other body established for the prosecution of persons responsible for serious violations of international humanitarian law committed outside the State."

Switzerland, *Arrêté fédéral relatif à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire* of December 21, 1995. Entered into force on December 22, 1995. The act will remain in force until December 31, 2003. The fact that Switzerland implements the Security Council Resolutions on the establishment of Tribunals for Yugoslavia and Rwanda is remarkable. Switzerland is not a member to the United Nations. However, the Swiss government observed that article 29 of the Statute obliges "all states" and not just "member states to the United Nations" to cooperate with the Tribunal. In their Explanatory Memorandum,⁴ the Swiss government gave three reasons for the implementation. Switzerland has the same interest as other members of the international community in international peace and security. Secondly, the implementation means enforcement of international humanitarian law. Being a depositary to most of the international

⁴ See message concernant l'arrêté fédéral relatif à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire du 18 octobre 1995.



humanitarian conventions Switzerland is obliged to cooperate. Lastly, Switzerland participated actively in drafting the Statute. Not to implement the Statute would be inconsistent.

The act itself is drafted according to the structure of the Swiss act on international judicial cooperation in criminal matters. That general act is applicable unless the act implementing the Security Council Resolutions provide differently. All forms of assistance of the general act on international assistance can also be rendered to international tribunals. The remit of the act could be extended when other tribunals are established. In their Explanatory Memorandum the government states that assistance given to the Tribunals must be in compliance with the European Human Rights Convention and the International Covenant on Civil and Political Rights. Switzerland is the only country to stipulate that information and evidence shall be sent spontaneously to the Tribunals (article 3, paragraph 1 sub a and article 8), an obligation which it bases on article 18, paragraph 1 of the Statute of the Yugoslavia Tribunal and article 17, paragraph of the Statute of the Rwanda Tribunal. Article 9 stipulates the deferral to the Tribunal. Article 10 stipulates a general obligation to transfer suspects to the Tribunal. However, Swiss nationals can only be transferred if the Tribunal guarantees that their penalty will be executed in Switzerland. Article 22 offers the legal basis for sittings of tribunals in Switzerland. Article 23 allows the Tribunals, also the only act to stipulate this, to send summonses directly by mail to persons on Swiss territory.

Turkey, Draft Law on Activities of the International Tribunal Established for the Crimes Committed in Former Yugoslavia and its Relations with National Judicial System of June 24, 1994. The Turkish draft briefly follows the guidelines of the Tribunal. Invoking Article 32 of the Statute, article 9 of the Turkish law states that the costs of transportation and accommodation for suspects, witnesses and experts who appear before the Tribunal shall be borne by the Tribunal. This seems to be a misunderstanding of article 32 of the Statute, which only refers to the costs of the Tribunal in its functioning.

B. Bosnia Hands Over Two Persons to War Crimes Tribunal and Accord Reached on Rules on Arrest of Future Suspects

by Bruce Zagaris

On February 12, 1996, in an accommodation that may reduce growing tensions within the former Yugoslavia that threaten the fragile peace, the Bosnian Government delivered to the War Crimes Tribunal two senior Serbian military officers it had arrested on January 30, 1995, and all sides reached an agreement limiting future arrests.¹⁴ The arrest and hand-over of military officials is part of the implementation of the Dayton Accords that were negotiated in November and signed in Paris on December 14, 1995.

Following talks with U.S. Assistant Secretary of State Richard C. Holbrooke, who shuttled between Sarajevo and Belgrade in an effort to reduce tensions that occurred after Bosnian officials arrested ten Serbs on suspicion of war crimes, the Bosnian Government announced that it would no longer arrest people on suspicion of war crimes without authorization from the international war crimes tribunal in The Hague.

Following the same negotiations, NATO officials in Sarajevo announced that they had provided an aircraft to fly the two Serbian officers, General Djorde Djukic and Col. Aleksa Krsmanovic, to The Hague, and turned them over to the custody of the war crimes tribunal. The two Serbs were arrested after taking a wrong turn into Government territory.

¹⁴

Chris Hedges, *Bosnia Limits War-Crimes Arrests After NATO Delivers 2 Suspects*, N.Y. TIMES, Feb. 13, 1996, at A1, col. 1.